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8 **UNITED STATES DISTRICT COURT**
 9 **NORTHERN DISTRICT OF CALIFORNIA**

10
 11 In Re *Ex Parte* Application of
 12 Path Network, Inc. and Tempest Hosting,
 13 LLC,
 14 Applicants.

CASE NO. 3:23-MC-80148-JST

**OPPOSITION OF APPLICANTS PATH
 NETWORK, INC. AND TEMPEST
 HOSTING, LLC TO RENE ROOSEEN AND
 GAME SERVER KING'S CORRECTED
 MOTION TO INTERVENE AND QUASH,
 MODIFY, OR STAY EXECUTION OF THE
 SUBPOENA TO DISCORD, INC.**

17 Judge: Hon. Jon S. Tigar

18 Date: March 28, 2024

19 Time: 2:00 p.m.

20 Courtroom: 6 - 2nd Floor (Virtual Hearing)

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1 Path Network, Inc. (“Path”) and Tempest Hosting, LLC (“Tempest”; collectively,
 2 “Applicants”) hereby respectfully submit this Opposition to Rene Roosen (“Roosen”) and Hosting
 3 King, Inc., d/b/a Game Server Kings’ (“GSK”) Motion to Intervene and Quash, Modify, or Stay
 4 Execution of the Subpoena to Discord, Inc. (“Motion”; “Discord”).)

5 INTRODUCTION

6 Path and its subsidiary, Tempest, both Arizona data hosting and data security companies, are
 7 currently suing Curtis Gervais, a former Tempest employee, and his company, Packet Rabbit Inc., in
 8 Canada (“PR”; the “*Gervais Action*”).¹ In the *Gervais Action*, Path and Tempest assert claims
 9 against Gervais and PR for, among other things, misappropriation of confidential information,
 10 dissemination of defamatory lies about Path and Tempest to third parties, and spoliation of evidence.
 11 Additionally, and of fundamental importance here, Path and Tempest allege that Gervais and PR
 12 acted in concert with Roosen in many of these efforts. Specifically, Path and Tempest allege that
 13 Gervais misappropriated Path and Tempest’s confidential information and sent it to Roosen, who
 14 then used it to defame Path and Tempest and try to convince Path’s and Tempest’s customers to
 15 leave them and migrate to GSK, a competitor company that Roosen founded. Moreover, Path and
 16 Tempest allege that Gervais and Roosen used multiple online accounts, including chat accounts
 17 hosted by a messaging platform called Discord, to engage in this misconduct.²

18 After taking several steps to collect discovery in Canada, on May 5, 2022, Path and Tempest
 19 applied for a subpoena in the Northern District of California pursuant to 28 U.S.C. § 1782 (“Section
 20 1782”) seeking additional relevant evidence for the *Gervais Action*. In its application, Path and
 21 Tempest sought to require Discord, a California-based company, to provide account and messaging
 22 data for Gervais, Roosen, Archetype (a suspected Gervais alias), and various third parties identified
 23 in the *Gervais Action* as parties to whom Gervais made defamatory statements and disclosed

24
 25¹ Gervais incorporated PR in November 2020 and is its sole officer and director.

26² Roosen does not reside in Canada and as a result he is not named in the *Gervais Action*.
 27 Nevertheless, he is heavily mentioned throughout the *Gervais Action* statement of claim and is a
 critical actor in Gervais’s defamatory scheme.

1 confidential information. Subsequently, Path, Tempest, and Discord engaged in substantial
 2 briefing, attended a hearing with the Court³, and engaged in additional meet and confer efforts to
 3 ensure that any subpoena issued complied with the Federal Rules of Civil Procedure, the Stored
 4 Communications Act (“SCA”), was otherwise permissible under Section 1782, and that a
 5 protective order was in place. On December 26, 2023, the Court issued and served a legitimate
 6 and lawful subpoena on Discord (the “Discord Subpoena”).

7 Discord was expected to make an electronic production pursuant to the Discord Subpoena
 8 on January 22, 2024. On January 21, 2024, Roosen and GSK filed the instant Motion.

9 In their Motion, Roosen and GSK launch malicious and baseless attacks on the credibility
 10 of Path’s and Tempest’s officers and Canadian counsel (as well a Canadian judge) and question
 11 the validity of a pre-discovery search and seizure order Path and Tempest obtained in Canada (the
 12 Anton Piller Order) in an attempt to convince the Court that, given the “suspicious” nature of the
 13 Anton Piller Order, the Court should quash the Discord Subpoena.

14 In addition to being unfounded and incorrect, Roosen’s and GSK’s arguments miss the
 15 mark because they focus solely on the Anton Piller Order and ignore the existence of the primary
 16 case – the *Gervais* Action – and Path’s and Tempest’s legitimate, and statutorily provided for,
 17 ability to obtain discovery from a U.S. non-party for use in *that action*.

18 Roosen and GSK also attempt to leverage their unfounded credibility attacks to further an
 19 argument that the Discord Subpoena is nothing more than an attempt by Path and Tempest to steal
 20 GSK’s trade secret information. Again, their arguments fail, as the purported trade secret
 21 information is either already publicly available or not called for by the subpoena.

22
 23
 24
 25
 26 ³ From May 5, 2022 to January 31, 2024, this cases was presided over by the Honorable Peter H.
 27 Kang. As of February 1, 2024, the case is now presided over by the Honorable Jon S. Tigar.
 28 When discussing the procedural history of this case, the term “Court” refers to the Honorable
 Peter H. Kang. When asking for future relief, “Court” refers to the Honorable Jon S. Tigar.

1 Contrary to Roosen’s and GSK’s assertions, the Discord Subpoena is a straightforward
 2 attempt to obtain relevant, appropriate discovery for use in the legitimate and ongoing *Gervais*
 3 Action, and accordingly, Roosen’s and GSK’s Motion should be denied.⁴

4 **FACTUAL AND PROCEDURAL BACKGROUND**

5 **I. THE PARTIES**

6 Path is an Arizona company that provides online data hosting and cyber security services
 7 to subscribers. (Affidavit of Daina Slenys (“Slenys Affidavit”) Ex. A at ¶ 3, ECF No. 1-3.)
 8 Tempest, Path’s subsidiary, is an Arizona company that provides online virtual hosting services.
 9 (*Id.* at ¶ 4.) Tempest specializes in leasing servers to customers and providing online virtual
 10 hosting. (*Id.*) Path owns and operates the servers and provides cutting-edge cyber security and
 11 data protection to ensure the data stored on the servers leased by customers is not compromised.
 12 (*Id.* at ¶ 17.)

13 Gervais is a Canadian citizen who became a Path and Tempest customer in or about June
 14 2020. (*Id.* at ¶ 20.) He incorporated PR, a Canada corporation, in November 2020. *Id.* He is
 15 PR’s sole director and officer. (*Id.* at ¶ 6.) PR is also an online virtual hosting company that
 16 operates and leases servers to customers for a monthly fee. (*Id.* at ¶ 21.) From approximately July
 17 8, 2021, to September 16, 2022, Gervais, who lives in Ontario, Canada, also worked for Tempest.
 18 (*Id.* at ¶ 6.) As a result of his work, he had access to confidential information about both Tempest
 19 and Path. (*Id.*)

20 On or about June 24, 2022, Tempest demoted Gervais based on his admitted cyber
 21 hacking. (*Id.* at ¶¶ 70-81.) Shortly after his demotion, Gervais targeted Path and Tempest.
 22 Gervais disclosed Path’s and Tempest’s confidential information to third parties including GSK,
 23 made defamatory comments concerning Path and Tempest and told third parties of his intentions
 24 to harm Path and Tempest, including by “drown[ing]” the companies. (*Id.* at ¶¶ 83-86.)

25
 26

⁴ Path and Tempest do not oppose Roosen and GSK’s arguments regarding the right to intervene
 27 in these proceedings, but their request for quashing, altering or limiting the subpoena should be
 denied.

1 As the CEO and founder of GSK, a company that is a competitor to Path, Roosen is a
 2 critical actor in Gervais' defamatory scheme - the two have conspired together to harm Path and
 3 Tempest. (*Id.* at ¶¶ 97-100, 115-119.) Specifically, Gervais provided Roosen with confidential
 4 and/or false information about Path and Tempest, which Roosen used to convince *additional* third
 5 parties to terminate their user agreements with Path and Tempest and instead start a relationship
 6 with GSK. (*Id.*) Discord is one of the primary platforms that Gervais and Roosen use to
 7 communicate with each other and with third parties in their effort to defame Path and Tempest and
 8 destroy their businesses by poaching clients, including by using the Archetype, Renual, and CMG
 9 aliases to do so. (*Id.*; Affidavit of Tom Warren ("Warren Affidavit") at ¶ 33, Ex. A at ¶89, ECF
 10 No. 1-2.)

11 On September 15, 2022, Gervais resigned from Tempest. (*Id.* Ex. A at ¶¶ 112-114.)
 12 Beginning on January 5, 2023, Path and Tempest believe that Gervais began using the alias
 13 Archetype in his ongoing efforts to harm them. (*Id.* at ¶¶ 156-166.) Specifically, Archetype used
 14 Discord to offer Path's and Tempest's confidential source code and other confidential information
 15 for sale to third parties (which, assuming it is Gervais, he collected during his employment, which
 16 is propriety information vital to the operation and success of Path's and Tempest's businesses) on
 17 the dark web for upwards of \$800,000.00. (*Id.*) Despite posting on Discord that Archetype had
 18 access to Path's and Tempest's confidential source code and other confidential data, when Path
 19 representatives attempted to correspond with Archetype (using fake usernames to conceal their
 20 identity) to confirm the confidential data was real, Archetype refused to disclose additional
 21 information unless they paid Archetype \$50,000.00. (*Id.*) Because Gervais was one of the only
 22 Path and Tempest employees who had access to this data, and given Gervais's many other
 23 attempts to damage Path, Path and Tempest believe that Archetype is Gervais and that Gervais
 24 was ransoming this data. (*Id.*) Additionally, Path and Tempest confirmed that Gervais accessed
 25 some of the confidential data that Archetype ransomed on Discord as recently as June and August
 26 of 2022, even though he was not required to interact with those databases as part of his job. (*Id.*)
 27
 28

1 On information and belief, Gervais and Roosen, acting together and separately, continue to
 2 use various aliases to defame Path and Tempest, poach their clients for GSK's and Roosen's
 3 benefit, and disseminate or threaten to sell proprietary and confidential information. (*Id.* at ¶¶ 97-
 4 100, 115-119.)

5 **II. PATH AND TEMPEST REQUEST, AND RECEIVE, EXTORDINARY PRE-**
 6 **LITIGATION INJUNCTIVE RELIEF IN CANADA**

7 In preparation for filing a civil claim against Gervais in Canada, on or about December 21,
 8 2022, Path and Tempest filed a Notice of Action, Motion Record, and Factum in the Canadian
 9 Court seeking pre-litigation evidence preservation, and a general injunctive order related to the
 10 *Gervais* Action. (Slenys Affidavit ¶ 4.) Under Canadian law, a party can file *ex parte* requests for
 11 these extraordinary forms of injunctive relief to prevent prospective defendants from destroying
 12 evidence upon learning of litigation.⁵

13 On January 9, 2023, after reviewing written submissions and conducting an *ex parte*
 14 hearing, the Canadian Court issued the following orders (the "Canadian Court's Orders"):

- 15 • An Anton Piller Order, which is analogous to a search warrant in the United
 States, with respect to Gervais' residence in Lanark, Ontario⁶;
- 16 • A Stand and Deliver Order, which requires Gervais turn over off-site
 evidence not located at Gervais' residence in Lanark, Ontario, and assets of
 PR to the Plaintiffs⁷; and

19

20 ⁵ An Anton Piller order allows a claimant to enter the defendant's premises and search for and
 21 seize certain items or documents that are likely to be destroyed. A party seeking an Anton Piller
 22 order must establish (1) an extremely strong *prima facie* case, (2) the damage, potential or actual,
 23 must be very serious to the claimant, and (3) clear evidence that the defendants have in their
 24 possession incriminating documents or other information, and there is a real possibility that they
 may destroy such material before discovery can be performed. *Litigation and Enforcement in*
Canada: Overview, Practical Law Country Q&A 7-502-0711 (February 5, 2024).

25 ⁶ The Canadian Court's Orders require, among other things, that Warren collect Discord
 26 messaging data involving Gervais, Roosen, Archetype, Renual, and CMG. (Warren Affidavit Exs.
 B, C, F.)

27 ⁷ PR's off-site data is Gervais' off-site data because he is the sole director and officer of PR and he
 28 uses PR to engage in unlawful conduct in order to shield himself from liability. (Warren Affidavit

- A general injunctive order, which prohibits Gervais from continuing certain misconduct that forms the basis for the *Gervais* Action.

(*Id.* at ¶¶ 5-7; Warren Affidavit ¶¶ 3-4.) In issuing its Orders, the Canadian Court found that the circumstances exist for granting the Anton Piller Order in that:

- 1) The Plaintiff has demonstrated a strong *prima facie* case;
 - 2) The damage to the Plaintiff of Gervais' alleged misconduct, potential or actual, is very serious;
 - 3) There is convincing evidence that Gervais, as well as corporations under his direction or related to him, have in their possession incriminating evidence; and
 - 4) There is a real possibility that Gervais and others acting under his control may destroy, disseminate or make use of that evidence, before the discovery process can do its work [citation omitted].

(Warren Affidavit ¶¶ 4-5; Slenys Affidavit ¶ 8.)

On January 10, 2023, during the execution of the Canadian Court’s Orders, three laptops, two cell phones, two iPads, and numerous credit cards in PR’s name were turned over by the authorities conducting the search to Warren, one of the court-appointed independent data forensics specialists. (Slenys Affidavit Ex. A ¶¶ 168-170; Warren Affidavit ¶¶ 10-12.) Also during the execution of the Canadian Court’s Orders, Warren attempted to search, image, and save data from Gervais and PR’s cloud-based accounts, which included Discord. (*Id.* at ¶ 171; *Id.* at ¶¶ 10-14.) When asked for the passwords to his various devices, Gervais stated that they were stored on an encrypted repository called “LastPass.” (*Id.*; *Id.* at ¶ 11.) Gervais’ LastPass password list showed that he had 417 sets of login credentials for various applications and websites. (*Id.* at ¶ 172; *Id.* at ¶ 12.)

Before the search concluded for the day, Warren changed Gervais' LastPass password such that Gervais could not access the account and delete relevant evidence while the searches and preservation efforts remained ongoing. (*Id.* at ¶¶ 173, 176; *Id.* at ¶ 13.)

However, days later when Warren attempted to access Gervais' LastPass account to complete the execution of the Canadian Court's Orders, LastPass sent Gervais an email to verify

Ex. A at ¶¶ 7, 224; see also Warren Affidavit Ex. B (Canadian Court order using Gervais and PR interchangeably); Warren Affidavit Ex. C (same).)

1 that the login attempt was valid. (*Id.* at ¶ 181; *Id.* at ¶ 24.) Gervais failed to respond to Warren’s
 2 requests to verify the log-in attempt. (*Id.* at ¶ 182; *Id.* at ¶ 25.) Gervais ultimately claimed he was
 3 unable to verify the log-in attempt because he was locked out of both his email and his LastPass
 4 accounts. (*Id.*; *Id.*) Gervais claimed that despite his efforts, he could not regain access to his
 5 email. (*Id.* at ¶¶ 186, 195; *Id.*)

6 On January 20, 2023, the Canadian Court extended its Orders to June 2, 2023. (*Id.* at ¶
 7 190; *Id.* at ¶ 34; Warren Affidavit Ex. H.) On May 11, 2023, the Canadian Court again extended
 8 those Orders until July 27, 2023, the date of an upcoming hearing. (Declaration of Hannah A.
 9 Bogen (“Bogen Decl.” Ex. A.) On July 27, 2023, the Canadian Court again extended the above
 10 Orders until October 19, 2023, the new date for the hearing originally scheduled for July 27, 2023.
 11 (*Id.* Ex. B.) On October 11, 2023, the Canadian Court suspended all case deadlines, including the
 12 October 19, 2023 deadline above, pending adjudication of a motion to transfer the *Gervais* Action
 13 to Toronto, which remains pending. (*Id.* Ex. C.)

14 To date, despite substantial efforts, Warren has been unable to gain access to Gervais’
 15 email, Discord, and/or LastPass accounts. (Warren Affidavit ¶¶ 49-51.)

16 III. **PATH AND TEMPEST FILE SUIT AGAINST GERVAIS AND PR IN CANADA**

17 On March 9, 2023, Path and Tempest filed the *Gervais* Action, for which the pre-litigation
 18 discovery described above was intended to be used.⁸ (See Slenys Affidavit Ex. A; Bogen Decl. ¶
 19 2.) In the *Gervais* Action, Path and Tempest allege that Gervais (i) misappropriated confidential
 20 information for his unauthorized use and benefit, (ii) solicited Path and Tempest’s customers and
 21 staff using that misappropriated confidential information, (iii) conspired with others, including
 22 Roosen, to cause harm to Path and Tempest, (iv) contacted Path and Tempest’s customers,
 23 investors, and staff for the purposes of disseminating false and defamatory misinformation on the
 24 internet and to third parties regarding Path and Tempest’s officers and the financial health of Path
 25 and Tempest, (v) used PR as his *alter ego* to shield himself from liability and commit additional
 26

27 ⁸ The *Gervais* Action and the Canadian Court’s Orders are collectively referred to as the
 28 “Canadian Proceedings.”

1 misconduct, and (vi) continues to engage in spoliation of evidence of his tortious and wrongful
 2 conduct by intentionally destroying evidence and falsely claiming he cannot access data that the
 3 Canadian Court ordered him to produce. (*See Slenys Affidavit Ex. at ¶¶ 227, 236-237.*)

4 Path and Tempest asserted claims against Gervais and PR for:

- 5 1. Unlawful Interference in Economic Interests and Breach of
 Confidence;
- 6 2. Breach of Contract(s) (both Gervais' Employment Agreement with
 Path and his Independent Contractor Agreement);
- 7 3. Piercing the Corporate Veil/Gervais' Use of PR as his Alter Ego;
- 8 4. Breach of Fiduciary Duty and Trust;
- 9 5. Internet Harassment;
6. Conspiracy to Harm Path; and
7. Spoliation of Evidence.

10 (*See Warren Affidavit Ex. A. ¶¶ 215-238*)

11 Roosen is a key actor in four of Path's and Tempest's seven claims against Gervais and PR
 12 (although, as a non-Canadian resident, he is not named as a defendant in the *Gervais Action*).
 13 (*See Warren Affidavit Ex. A.*). Specifically, Path and Tempest allege that Gervais shared Path's
 14 and Tempest's confidential information with Roosen and worked with Roosen to use that
 15 information, as well as defamatory statements, to solicit Path's and Tempest's clients and potential
 16 clients to join Roosen's company GSK, and that they conspired together to unlawfully interfere in
 17 Path and Tempest's economic interests, to breach fiduciary duties owed to Path and Tempest, to
 18 engage in internet harassment, and to harm Path. (*Warren Affidavit Ex. A at ¶¶ 89, 97-100, 208,*
 19 *215-235.*) Path's and Tempest's allegations against Gervais also include allegations detailing the
 20 way in which Archetype, one of Gervais' suspected aliases, threatened to sell Path and Tempest's
 21 confidential source code and data on the dark web for upwards of \$800,000.00. (*Id. at ¶¶ 156-66.*)
 22 Path and Tempest also allege that Gervais has engaged in spoliation of evidence relevant to the
 23 above conduct in the following ways:

- 24 • Secretly accessing email accounts which he claims to be locked out of and
 quickly deleting contents;
- 25 • Secretly accessing his Discord account from which he claims to be locked
 out;
- 26 • Sequestering information with respect to the PR servers, equipment and data
 as housed at a second Data Center location;

- 1 • Seeking help from PR customers to access and remove relevant evidence
2 from PR servers at a secure data center; and
- 3 • Destroying documents and evidence to affect the outcome of the litigation
4 and in an attempt to further conceal his wrongful conduct and the wrongful
conduct of all Defendants. Id. at ¶¶ 236-38.

5 **IV. PATH AND TEMPEST SEEK DISCOVERY FROM DISCORD IN THE UNITED**
6 **STATES IN AID OF THE GERVAIS ACTION**

7 In furtherance of the *Gervais* Action, on May 5, 2022, Path and Tempest filed an *Ex Parte*
8 Application for an Order to Take Evidence Pursuant to Section 1782 (the “Application”) seeking a
9 subpoena to Discord. (*See* ECF No. 1.) Section 1782 governs the collection of evidence to be
10 used in foreign proceedings and permits assistance to foreign tribunals so long as certain criteria
11 are met. *See* 28 U.S.C. § 1782. In the Application, Path and Tempest asked the Court to issue a
12 subpoena requiring Discord to produce account and messaging data associated with Roosen and
13 Gervais and various usernames that were suspected aliases they used to engage in the misconduct
14 alleged in the *Gervais* Action. (*See* ECF No. 1.)

15 On August 16, 2023, the Court issued a tentative ruling on the Application (*see* ECF No.
16 15) and on August 17, 2023, the Court held a hearing to discuss the proposed subpoena. (*See* ECF
17 Nos. 7, 15, 16.) During the hearing, the Court ordered Path, Tempest, and Discord to meet and
18 confer and revise the subpoena to meet with the requirements outlined in its August 16, 2023
19 tentative ruling, and to brief any unresolved issues. (*See* ECF No. 16.) Of relevance here, those
20 requirements included ensuring that the subpoena does not unnecessarily implicate third parties
21 unrelated to the litigation and was not unduly burdensome or overbroad. (*See* ECF No. 24 at ¶3-7)

22 Between August 17, 2023 and August 25, 2023, Path, Tempest, and Discord met and
23 conferred regarding the above issues and on September 1, 2023, they submitted a joint stipulation
24 and proposed protective order to govern the case (ECF No. 19) and supplemental briefing
25 regarding the issues they could not resolve through meet and confer efforts, including whether or
26 not the subpoena as written sought communications in violation of the Stored Communications
27 Act (“SCA”). (*See* ECF Nos. 21, 22.) After reviewing the briefing, on November 22, 2023, the

Court issued an order granting in part and denying in part Path's and Tempest's original Application. (See ECF No. 23.) The Court ordered the parties to meet and confer on a final subpoena that complied with its November 22, 2023 order, the Federal Rules of Civil Procedure, Section 1782, and the SCA, and submit it, along with a joint stipulation, for the Court's review within 30 days. (*Id.*)

On or around December 26, 2023⁹, Path, Tempest, and Discord filed a joint stipulation and the Discord Subpoena that was mutually agreed to and complied with the Court's November 22, 2023 order. (See ECF No. 27.) The Court issued it on the same date. (ECF No. 29.)

V. **THE INSTANT PROCEEDINGS**

On January 21, 2024, the day before Discord was scheduled to make its production, Roosen and GSK filed the instant Motion, which was subsequently corrected the following day. (See ECF Nos. 30, 31.)

ARGUMENT

I. **THE DISCORD SUBPOENA IS PROPER**

A. The Subpoena Complies with Section 1782 and the *Intel* Factors.

Pursuant to 28 U.S.C. § 1782, the Court has authority to order the production of evidence in aid of a foreign proceeding if (1) the request made "by a foreign or international tribunal," or by "any interested person"; (2) the request seeks evidence, whether it be the "testimony or statement" of a person or the production of "a document or other thing"; (3) the evidence is intended "for use in a proceeding in a foreign or international tribunal"; and (4) the person from whom discovery resides or is found in the district of the district court ruling on the application for assistance.

Ishiyama v. Google LLC, No. 22-MC-80192-EJD, 2022 WL 17970190, at *1 (N.D. Cal. Dec. 27, 2022) (citations omitted); 28 U.S.C. § 1782. In addition to the statutory factors, the Supreme

⁹ Path, Tempest, and Discord originally filed a joint stipulation and revised subpoena in compliance with the Court's 30-day deadline. (See ECF No. 24.) However, that docket entry was removed because the parties inadvertently included confidential birth date information. (See ECF Nos. 25-26, 28.) Accordingly, the docket shows that the parties submitted a final stipulation and revised subpoena for the Court's review on December 26, 2023. (See ECF No. 27.)

Court set forth the following discretionary factors that may be considered in deciding whether to grant an application for production of evidence for use in a foreign proceeding: (1) whether “the person from whom discovery is sought is a participant in the foreign proceeding” . . . (2) “the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance”; (3) “whether the [Section] 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States”; and (4) whether the request is otherwise “unduly intrusive or burdensome.” *Ishiyama*, 2022 WL 17970190, at *1 (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).)

On November 22, 2023, after substantial briefing and a hearing with the parties, the Court found that the Discord Subpoena met all of the statutory requirements pursuant to Section 1782 and that all but one of the discretionary factors outlined in *Intel Corp.*, 542 U.S. 241, weighed in favor of granting Path’s and Tempest’s subpoena as drafted, with the unmet factor weighing toward modifying, but still issuing, the subpoena:

In sum... Applicants have satisfied all three statutory requirements... discovery relating to the foreign proceeding is authorized under Section 1782...[however,] the subpoena as drafted risks imposing further undue burden on Discord both in its search for responsive documents and in its attempts to reasonably filter out the truly irrelevant misidentified information from the information on the specific Messrs. Gervais and Roosen actually of interest...[h]owever, the Court finds that Applicants’ failure to satisfy this discretionary factor does not require a negative finding on the threshold issue of whether any discovery should be authorized in the first instance; rather this factor requires the Court to find that the proposed discovery, in its present form, should be modified...[t]herefore, the Court GRANTS-IN-PART Applicants’ application for leave to serve a document subpoena on Discord, and GRANTS Applicants leave to submit a revised subpoena as discussed further herein after appropriate meet and confer with Discord.

(See ECF No. 23 pp. 7-18.) Specifically, the Court held that the subpoena as drafted was unduly burdensome and overbroad because (1) the place of production – Los Angeles – would be over 100 miles from Discord’s headquarters in San Francisco, California, (2) the subpoena needed defined terms and additional identifying information so that accounts connected to Gervais and Roosen could be easily preserved and collected, (3) the disclosure of account passwords and

1 message content violated the Stored Communications Act (“SCA”), and (4) a protective order was
 2 required. (See ECF No. 23 pp. 14-33.)

3 After engaging in meet and confer efforts to revise the subpoena as ordered by the Court,
 4 on December 26, 2023, Path, Tempest, and Discord filed a joint stipulation and proposed order,
 5 attaching the Discord Subpoena, in the form in which it was ultimately issued. (See ECF Nos. 27,
 6 29.) As outlined in the stipulation, (1) Discord would produce responsive materials electronically,
 7 such that it would not be required to travel any distance to make a production, and that, if hard
 8 copy transmission was necessary, Path and Tempest would send a representative to Discord’s
 9 headquarters to collect the hard copies (ECF No. 27 ¶ 9), (2) the Discord Subpoena would include
 10 definitions and additional identifying information so that Gervais’s and Roosen’s accounts could
 11 be easily preserved and collected (*Id.* ¶ 3), (3) the Discord Subpoena would no longer seek
 12 passwords or contents of electronic communications and would thus comply with the SCA (*Id.* ¶¶
 13 2, 6), and (4) any productions in response to the Discord Subpoena would be subject to the joint
 14 and stipulated protective order as issued on September 1, 2023. (See ECF No. 19.) On December
 15 26, 2023, the same date the Discord Subpoena was submitted to the Court, the Court issued it and
 16 it was deemed served on Discord. (ECF No. 29.)

17 **1. The Discord Subpoena Satisfies Section 1782.**

18 For the reasons outlined in Path’s and Tempest’s Application (ECF No. 1) and the Court’s
 19 November 22, 2023 order (ECF No. 29), the Discord Subpoena satisfies the statutory factors in
 20 Section 1782. Roosen and GSK’s arguments to the contrary lack merit and are little more than red
 21 herrings designed to distract the Court from Roosen’s own alleged misconduct and prohibit Path
 22 and Tempest from obtaining evidence of that misconduct.

23 Roosen spends much of his Motion suggesting that the Anton Piller Order has expired, and
 24 that its expiration ends the litigation in Canada. (Mot. pp. 15-16, ECF No. 31.) As an initial
 25 matter, the Anton Piller Order remains in full force and effect. (See Bogen Decl.) That said, even
 26 if the Anton Piller Order, a pre-litigation search and injunctive order, had expired, it would have
 27 little to no relevance here as the discovery sought in this matter is for use in the *Gervais* Action,
 28

1 which remains pending. (See ECF No. 1 (describing the foreign proceedings for which discovery
 2 is sought as the *Gervais* Action); ECF No. 23 pp. 9-10 (Court order noting that the discovery is for
 3 use in a foreign proceeding and relevant to both the *Gervais* Action and the Canadian Court’s
 4 Order).)

5 Roosen and GSK also argue that the scope of the Anton Piller Order shows that Roosen
 6 and GSK should be excluded from the Discord Subpoena because the Anton Piller Order only
 7 calls for the search and seizure of Gervais’s devices, not those of Roosen or GSK. (Mot. pp. 16-
 8 17.) Roosen’s reliance on the Anton Piller Order is once again misplaced. Path and Tempest did
 9 not seek the Discord Subpoena solely to collect evidence pursuant to, or for, the Anton Piller
 10 Order. Instead, Path and Tempest sought the Discord Subpoena to collect evidence for use in the
 11 *Gervais* Action, and in aid of the Canadian Court’s Orders, as recognized by the Court in its
 12 November 22, 2023 order. (ECF No. 23 pp. 9-10; Bogen Decl. ¶ 2.) The *Gervais* Action accuses
 13 Gervais and Roosen of conspiring together to unlawfully interfere in Path and Tempest’s
 14 economic interests, to breach fiduciary duties owed to Path and Tempest, to engage in internet
 15 harassment, and to harm Path by using defamatory and confidential information. (Warren
 16 Affidavit Ex. A at ¶¶ 89, 97-100, 208, 215-235.) The Anton Piller Order, and the instant Discord
 17 Subpoena, are both designed to collect information relevant to the *Gervais* Action and the
 18 Canadian Proceedings as a whole. (Bogen Decl. ¶ 2; See Slenys Affidavit Exs. A-D.) Because
 19 Roosen and GSK are critical actors in the defamatory scheme alleged in the *Gervais* Action,
 20 Roosen and GSK’s Discord data are highly relevant to the Canadian Proceedings and rightfully
 21 included in the Discord Subpoena.

22 2. The Discord Subpoena Satisfies all *Intel* Prongs.

23 Roosen’s and GSK’s arguments that the Discord Subpoena does not satisfy the first, third,
 24 and fourth *Intel* discretionary factors are also without merit. (*See* Mot. pp. 18-21.) As to the first
 25 factor, whether “the person from whom discovery is sought is a participant in the foreign
 26 proceeding”, *Intel Corp.*, 542 U.S. 241, Roosen and GSK seemingly acknowledge that the factor
 27 is met because Discord is not a party to the *Gervais* Action, but argue that, despite that, Path and
 28

1 Tempest should be required to show that the evidence sought from Discord cannot be obtained
 2 from Gervais's data alone. (Mot. pp. 18-19.) Putting aside whether any such demonstration
 3 should be required, it is clear that the evidence sought from Discord cannot be obtained solely
 4 from Gervais's data. By way of example, although the *Gervais* Action alleges that Roosen and
 5 Gervais acted together to harm Path, it does not mean they *always* acted together, or that Roosen
 6 never acted alone, and thus Discord's records related to Gervais would only capture a portion of
 7 the relevant evidence. Moreover, the subpoena asks for account information, including aliases and
 8 usernames employed by Roosen, which are relevant to demonstrating which of Gervais's
 9 communication occurred with Roosen, and would not be produced if the subpoena was limited to
 10 Gervais alone. Further, to the extent Gervais deleted messages with Roosen before Discord
 11 implemented preservation measures but Roosen did not, those messages would only remain in
 12 Roosen's data. As Discord is not a party to the *Gervais* Action (and, although not essential to this
 13 factor, the data sought cannot be obtained solely from Gervais's data), the Discord Subpoena
 14 properly seeks data related to Roosen.

15 As to the third factor, “whether the [Section] 1782(a) request conceals an attempt to
 16 circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United
 17 States”, *Intel Corp.*, 542 U.S. 241, Roosen argues that “the suspect and secretive nature of the
 18 Canadian proceedings” and the potential expiration of the Anton Piller Order prohibit the Court
 19 from determining which way this factor leans. (Mot. p. 19.) Roosen’s argument is utterly without
 20 merit. Other than Roosen’s specious assertions regarding proceedings that were, per Canadian
 21 statutory rules, conducted under seal, Roosen fails to identify any ways in which Path’s and
 22 Tempest’s subpoena request attempts to circumvent foreign proof gathering restrictions. To the
 23 contrary, as explained in Path’s and Tempest’s Application and the Court’s November 22, 2023
 24 Order (*See* ECF Nos. 1, 29), the discovery requested is in line with and *in furtherance* of the
 25 Canadian Court’s Orders requiring discovery in this matter.

26 Finally, as to the fourth factor, whether the request is otherwise “unduly intrusive or
 27 burdensome”, *Intel Corp.*, 542 U.S. 241, Roosen’s arguments are again without merit. (Mot. pp.
 28

1 20-21.) The Discord Subpoena seeks relevant and easily accessible information to be rightfully
 2 used in the Canadian Proceedings. Path and Tempest established, and Discord and the Court
 3 agreed, that the Discord Subpoena as written complies with the Federal Rules of Civil Procedure,
 4 Section 1782, and *Intel*. (ECF No. 27.)

5 In sum, the Discord Subpoena complies with Section 1782 and the *Intel* Factors, and all of
 6 Roosen's and GSK's arguments to the contrary are unfounded.

7 **B. The Discord Subpoena is Narrowly Tailored.**

8 As detailed in briefing and agreed to by both Discord and the Court, the Discord Subpoena
 9 as written seeks data relevant to the Canadian Proceedings, is not unduly burdensome or
 10 overbroad, and otherwise complies with the Federal Rules of Civil Procedure. (See ECF Nos. 1,
 11 27, 29.) As discussed above, the Court determined that the initial draft of the subpoena contained
 12 certain requests that were overbroad and unduly burdensome, and it ordered Path, Tempest, and
 13 Discord to meet and confer and revise the subpoena. (See ECF Nos. 15, 23.) The parties met and
 14 conferred and narrowed the subpoena. The Court held that the new version, the Discord
 15 Subpoena, was proper in all respects, and issued it. (Compare ECF No. 23 pp. 7-18; ECF No. 27;
 16 ECF No. 29.)

17 Despite this background, Roosen and GSK argue that the Discord Subpoena is overbroad
 18 because it (1) seeks irrelevant information and (2) is unlimited in time.¹⁰ Both arguments fail.

19 First, all data sought by the Discord Subpoena is patently relevant to the Canadian
 20 Proceedings. (See Bogen Decl. ¶ 2; Warren Affidavit Exs. A-D.) Data concerning and
 21 demonstrating Roosen's and GSK's activity on Discord, one of the platforms on which they are
 22 alleged to have conspired and taken actions to harm Path and Tempest, is undoubtedly relevant to
 23

24 ¹⁰ Roosen also argues that the Discord Subpoena is overbroad because it seeks information about
 25 Mr. Nacker, a GSK employee who purportedly uses the name "Ryz0r" on Discord. (Mot. 22.)
 26 Mr. Nacker was included in the Discord Subpoena based on the Canadian Court's inclusion of his
 27 purported username, Ryz0r, in the search terms to be used in connection with the Anton Piller
 Order. (See Warren Affidavit Exs. B, F.) That said, Path and Tempest do not oppose the request
 to remove "Ryz0r" from the Discord Subpoena.

1 the case. Second, the Discord Subpoena's lack of date restrictions is appropriate under the
 2 circumstances. Here, although Path and Tempest allege the *suspected* timeframe that Gervais and
 3 Roosen conspired together, (Warren Affidavit Ex. A ¶ 89 (describing time frame as "on or about"
 4 June 24, 2022")), Gervais's and Roosen's alleged misconduct may have started before Path and
 5 Tempest's current understanding and, upon information and belief, much of that misconduct
 6 continues today. Applying arbitrary start and end dates to the Discord Subpoena could eliminate
 7 highly relevant information concerning the formation of the conspiracy and any spoliation of
 8 evidence related to Path's and Tempest's case. Accordingly, the timeframe as stated in the
 9 Discord Subpoena is proper.

10 In sum, the Discord Subpoena seeks relevant information and is appropriately scoped with
 11 respect to time frame. As this Court previously held, the Discord Subpoena is proper. (*See* ECF
 12 No. 27.) The Court should deny Roosen and GSK's Motion.

13 **C. Roosen is Properly Included in the Discord Subpoena.**

14 Roosen's and GSK's arguments that they should not be included in the Discord Subpoena
 15 are also without merit. (Mot. pp. 20-21.) Roosen and GSK are repeatedly discussed in the
 16 statement of claim – the initiating document – in the *Gervais* Action. (*See* Warren Affidavit Ex.
 17 A.) Specifically, Roosen is described as Gervais's co-conspirator in unlawfully interfering with
 18 Path's and Tempest's economic interests, breaching fiduciary duties owed to Path and Tempest,
 19 engaging in internet harassment, and harming Path and Tempest using defamatory and
 20 confidential information. (*Id.* at ¶¶ 89, 97, 100, 208, 215-235.) Roosen is also named in Schedule
 21 A to the Anton Piller Order, which orders the collection of Gervais's communications mentioning
 22 Roosen. (*See* Warren Affidavit Ex. B Schedule A, subd. xiv., p.92.) Roosen and GSK are also
 23 listed as relevant terms in the Canadian Court's Orders to guide Warren's review for relevant data
 24 when collecting information from Gervais's devices. (*See* Warren Affidavit Ex. F, Schedule A, p.
 25 123.)

26 Roosen and GSK are both mentioned at length in the Canadian Proceedings and are
 27 properly included in the Discord Subpoena.

1 **D. Roosen’s Other Reasons for Quashing the Discord Subpoena Fail.**

2 Roosen and GSK raise various other arguments in support of their request to quash the
 3 Discord Subpoena, all of which are based on untruths and distractions that are irrelevant to the
 4 true purpose of the instant litigation – to gather relevant evidence in aid of a foreign proceeding
 5 where who is “good” and who is “bad” will be determined by the Canadian Court. Each of
 6 Roosen’s and GSK’s speculative assertions about the purpose of the Discord Subpoena are
 7 dispelled below.

8 First, contrary to Roosen’s and GSK’s unsupported allegations, the Canadian Proceedings
 9 are not “secretive” or “suspicious.” (Mot. p. 6.) They are properly filed, and currently pending
 10 proceedings under Canadian law (in which, notably, the Canadian Court, in a public ruling, found
 11 that Path and Tempest had “demonstrated a strong *prima facie* case” and that the “damage to [Path
 12 and Tempest] of Gervais’ alleged misconduct, potential or actual, is very serious.”). (*See* Warren
 13 Affidavit Ex. E.)¹¹

14 Second, the Discord Subpoena is not being used to collect Roosen’s and GSK’s
 15 confidential trade secret information. (*See* Mot.) Roosen and GSK argue throughout the Motion
 16 that its servers and channels contain customer lists that constitute trade secrets, and that the
 17 Discord data will reveal those secrets. (*Id.*) This argument is baseless as Roosen’s and GSK’s
 18 customer lists are in the public domain and can be accessed at any time. (Declaration of Marshal
 19 Webb (“Webb Decl.”) ¶¶2-6, Exs. A-D.) Accordingly, under both federal and California law,
 20 they do not constitute trade secrets. *See, e.g., InteliClear, LLC v. ETC Glob. Holdings, Inc.*, 978
 21 F.3d 653, 659-664 (9th Cir. 2020) (finding that, to constitute a trade secret, an owner must take
 22 reasonable measures to keep the information secret and the information must derive independent

24 11 Contrary to Roosen and GSK’s assertions that the Canadian Proceedings are somehow
 25 “secretive” or “suspicious,” in nature (Mot. p. 6), the Court previously took Judicial Notice of the
 26 fact that the Canadian Court was “the Superior Court of Justice in Ontario” and that “Superior
 27 courts are the highest level of courts in a province or territory. They deal with the most serious
 28 criminal and civil cases and have the power to review the decisions of the provincial and territorial
 29 courts.” (ECF No. 23 at 12-13.)

1 economic value, actual or potential, from not being generally known to, and not being readily
 2 ascertainable through proper means by, another person who can obtain economic value from the
 3 disclosure or use of the information); *Experian Info. Sols., Inc. v. Nationwide Mktg. Servs. Inc.*,
 4 893 F.3d 1176, 1188 (9th Cir. 2018) (“The subject matter of trade secrets ‘must be sufficiently
 5 novel, unique, or original that it is not readily ascertainable to competitors’...a trade secret cannot
 6 ordinarily consist of matters of public knowledge.” (citation omitted)); *Nextdoor.com, Inc. v.
 7 Abhyanker*, 2014 WL 1648473, at *4 (N.D. Cal. Apr. 23, 2014) (“Information that is generally
 8 known to the public or in an industry lacks the requisite secrecy.”).¹²

9 Third, contrary to Roosen’s and GSK’s assertions, the Discord Subpoena does not violate
 10 the SCA. (Mot. p. 21.) Pursuant to the Court’s November 22, 2023 order, and through
 11 discussions with Discord, the prior version of the Discord Subpoena was revised to remove any
 12 requests for content, resulting in the current Discord Subpoena. Despite this background, Roosen
 13 and GSK argue that the Discord Subpoena violates the SCA because “Path and Tempest’s request
 14 for the servers and channels Mr. Roosen has joined and maintained would reveal customer lists,
 15 contacts, and the content being discussed in those servers and channels...” (Mot. p. 21.) As an
 16 initial matter, the Discord Subpoena explicitly states that its requests do not “include the contents
 17 of electronic communications.” (ECF No. 29 at ¶ 2.) Accordingly, Roosen’s assertion that the
 18 subpoena calls for “the content being discussed in those servers and channels” is unfounded.
 19 (Mot. p. 21.) With regard to Roosen’s argument that disclosure of GSK’s customers and contacts
 20 would violate the SCA, that assertion is contrary to well established law, which holds that names
 21 are not content under the SCA. *See, e.g., In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1083 (N.D.
 22 Cal. 2015) (finding that the SCA does not apply to non-content, including account data, such as
 23 usernames and bibliographical information, that does not disclose the “substance, purport, or
 24 meaning” of a communication); *In re Request for Int'l Judicial Assistance from the Turkish*

25
 26 ¹² The fact that the customer lists are readily available online also debunks Roosen’s claims that
 27 Path and Tempest are seeking the Discord Subpoena to obtain those lists instead of in furtherance
 28 of the Canadian Proceedings. (*See* Webb Decl. Exs. A-D.)

Ministry of Justice, 2016 WL 2957032, at *2 (N.D. Cal. May 23, 2016) (citing *Thompson v. DoeI*, 2013 WL 5544607, at *1, 3 (N.D. Cal. Oct. 7, 2013) (approving subpoena, providing the application sought “documents sufficient to identify: ‘the names, addresses, telephone numbers, email addresses, and Media Access Control addresses of the owner’ of the email address, but not the content of any email.”); *Optiver Australia Pty. Ltd. & Anor. v. Tibra Trading Pty. Ltd. & Ors.*, No. C 12-80242 EJD PSG, 2013 WL 256771, at *3 (N.D. Cal. Jan. 23, 2013) (ordering compliance with subpoena for non-content metadata including “[d]ocuments sufficient to show the recipient(s), sender, date sent, date received, date read, and date deleted of emails, email attachments, or Google Talk messages...”); *Obodai v. Indeed, Inc.*, No. 13-80027-MISC EMC, 2013 WL 1191267, at *3 (N.D. Cal. Mar. 21, 2013) (“[s]ince subscriber information is not protected by the SCA, Indeed may obtain non-content information pursuant to a valid, civil subpoena.”). Accordingly, Roosen’s claims that the Discord Subpoena should be quashed or modified because it violates the SCA are meritless.

Fourth, Roosen’s request that only U.S. counsel for Path and Tempest be able to review any data produced pursuant to the Discord Subpoena is unwarranted and would defeat the purpose of the Discord Subpoena. (Mot. p. 21-22.) The Discord Subpoena seeks evidence for use in the Canadian Proceedings, which are being handled by Canadian counsel, and thus Canadian counsel needs access to the materials. (*See* ECF No. 1.) Further, Roosen offers no basis, other than his own manufactured claims of impropriety in the Canadian Proceedings, for this request. As demonstrated by the Bogen Declaration and all exhibits thereto, the Canadian Proceedings are legitimate and ongoing.¹³ (*See* Bogen Decl. Exs. A-C.) They are rightfully sealed as is common in cases concerning high risks of spoliation, not in an effort to hide information from this Court.¹⁴

¹³ Importantly, Roosen and GSK exclusively argue that the Anton Piller Order is expired, which it is not. (Mot. pp. 15-16.) Accordingly, any insinuation that the Canadian Proceedings as a whole are somehow “expired” or terminated should be disregarded.

¹⁴ Notably, the proceedings were under seal long before this Court became involved, demonstrating that the sealing was motivated by Canadian procedure and not a desire to hide

1 Under the instant circumstances, producing documents for U.S. Counsel's Eyes Only is
2 unwarranted and would defeat the purpose of the Discord Subpoena.

3 All of Roosen and GSK's remaining reasons to quash the Discord Subpoena fail and
4 Roosen's and GSK's Motion should be denied.

5 **CONCLUSION**

6 For the foregoing reasons, Path and Tempest respectfully request that the Court issue an
7 order denying Roosen's and GSK's Motion.

8
9 DATED: February 5, 2024

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15 TEMPEST HOSTING, LLC

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26
27 information from this Court. (See Warren Affidavit Ex. A (Statement of Claim filed on March 9,
28 nearly one year before Roosen and GSK's Motion was filed).)